



United States Department of the Interior
BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT
WASHINGTON, DC 20240-0001

In Reply Refer To:
Mail Stop VAE-BSEE-FOIA

July 9, 2019

Mr. Mike Masnick
Muckrock

Dear Mr. Masnick:

The Bureau of Safety and Environmental Enforcement (BSEE) FOIA office received your Freedom of Information Act (FOIA) request, dated November 12, 2018, on November 13, 2018 and assigned it control number **BSEE-2019-00032**. Please cite this number in any future communications with our office regarding your request.

You have requested:

“Any and all records and bills about Scott Angelle's cell phone number (571)585-3730. This includes texts to and from the number as well as emails or documents mentioning the number.”

On December 14, 2018, you clarified your request to “phone bills for Scott Angelle's cell phone number (571) 585-3730 as well as any text messages sent to and from (571) 585-3730.”

On February 5, 2019 we released a partial response to your FOIA request. We are writing today to complete your request on behalf of the BSEE. We have enclosed four documents containing of 4883 pages. Of those pages, we have determined that approximately 4883 pages are partially withheld under FOIA Exemption 5 5 U.S.C. § 552(b)(5) and Exemption 6 5 U.S.C. § 552(b)(6).

Exemption 5—43 C.F.R. §§ 2.23, .24

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” 5 U.S.C. § 552(b)(5); see *Nat'l Labor Relations Bd. v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges. The information being withheld consists of conference call pass codes and numbers and deliberate process privilege.

Deliberative Process Privilege

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are

not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the decisionmaker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public. .

The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of this information would have a chilling effect on the agency’s deliberative processes; expose the agency’s decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

Commercial Information Privilege

The BSEE has determined that the numbers and pass codes constitute intra-agency documents because they are only shared with members of the Department or their consultants for the purpose of conducting official government business. In addition to qualifying as intra-agency documents, the BSEE has determined that the pass codes and phone numbers qualify as “confidential commercial information” protectable by Exemption 5. In *Government Land Bank v. General Services Administration*, 671 F.2d 663, 665 (1st Cir. 1982), the court held that when the government enters the marketplace as an ordinary commercial buyer or seller, the government’s information should be protected from competitive disadvantage under Exemption 5. Exemption 5 prevails “where the document contains ‘sensitive information not otherwise available,’ and disclosure would significantly harm the government’s commercial interest.” *Id.* at 666; see also *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 363 (1979).

Here, the government entered the marketplace as an ordinary commercial buyer of private conference call numbers and pass codes. In line with *Land Bank* and *Merrill*, the information is “sensitive and not otherwise available” as the numbers provide access to sensitive conversations between government employees and only the government and seller have access to the information. If the conference call numbers and/or pass codes were released, the government’s financial interest would be significantly harmed. The conference calls would no longer be private since unknown, non-governmental parties would have the ability to listen in to the calls. The funds spent on purchasing the call-in numbers and pass codes would therefore be wasted, and the conference call numbers and pass codes would be of no use.

Because the release of the conference call numbers and pass codes would significantly harm the government's financial interest by publicizing sensitive information, the BSEE is withholding the information in accordance with Exemption 5 of the FOIA.

Exemption 6—43 C.F.R. §§ 2.23, .24

Exemption 6 allows an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

The phrase “similar files” covers any agency records containing information about a particular individual that can be identified as applying to that individual. To determine whether releasing records containing information about a particular individual would constitute a clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that would be affected by disclosure against any public interest in the information.

Under the FOIA, the only relevant public interest to consider under the exemption is the extent to which the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens ‘know what their government is up to. The burden is on the requester to establish that disclosure would serve the public interest. When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public. The purposes for which the request for information is made do not impact this balancing test, as a release of information requested under the FOIA constitutes a release to the general public.

The information that has been withheld under Exemption 6 consists of personal information, such as medical information and personal phone numbers, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of these individuals and we are withholding it under Exemption 6.

Mr. Gurney S. Small, Attorney-Advisor, Office of the Solicitor, Department of the Interior, Washington, D.C. was consulted.

Appeal Rights—43 C.F.R. §§ 2.57, .58, .59

In accordance with 43 C.F.R. §§ 2.57, .58, .59, you may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal **no later than 90 workdays** from the date of this letter. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the BSEE's response is in error. You must also include with your appeal copies of all correspondence between you and BSEE concerning your FOIA request, including your original FOIA request and BSEE's response. Failure to include with your appeal all correspondence between you and BSEE will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office Contact Information

Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, DC 20240
Attn: FOIA/Privacy Act Appeals Office

Telephone: (202) 208-5339
Fax: (202) 208-6677
Email: FOIA.Appeals@sol.doi.gov

Conclusion

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. *See* 5 U.S.C. 552(c). This response is limited to those records that are subject to the requirements of FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770

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Fax: 202-741-5769
Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer.

We do not bill requesters for FOIA processing fees when their fees are less than \$50.00, because the cost of collection would be greater than the fee collected. *See 43 C.F.R. § 2.49(a)(1).* Therefore, there is no billable fee for the processing of this request.

If you have any questions, please contact me at BSEEOFIA@bsee.gov.

Sincerely,

/s/Ashley Rychak
Ashley Rychak
Government Information Specialist (FOIA)
BSEE FOIA Office

Enclosure